IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 181 of 2006
With
CIVIL APPLICATION No. 13307 of 2006
In
SECOND APPEAL No. 181 of 2006
With
SECOND APPEAL No. 182 of 2006
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CIVIL APPLICATION No. 13308 of 2006
In
SECOND APPEAL No. 182 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHANDULAL ANANTRAI DAVE - Appellant(s)
Versus
SATHVARA JADIBEN DEVABHAI - Defendant(s)

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Appearance :

MR DEEPAK M SHAH for Appellant(s) : 1,
MR SHIRISH JOSHI for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 12/03/2007

COOMON ORAL JUDGMENT

1. On 27.11.2006, notice was issued to the other side to show cause that why both the appeals be not admitted on the proposed questions and be not finally disposed of. Each of the appeals is admitted for hearing the parties on the following substantial questions of law:-

> *"[i] Whether on the facts and in the circumstances of the case, the learned first appellate court was justified in holding that in absence of carrying out amendment within time and in absence of compliance of Order VI, Rule 18 of the Civil Procedure Code, the plaintiff was not entitled to press into service the amended pleadings?*
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> *[ii] Whether the learned first appellate court was right and justified in holding that a specific relief was to be claimed by the plaintiff against defendant no.2, who was holding the sale deed, exh.84, in her favour, while, in fact, exh.84 is a registered agreement to sell and not sale deed?*
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> *[iii] Whether on the facts and in the*

circumstances of the case, is the plaintiff required to seek a declaration from the court that any agreement entered into by the defendant in favour of third party be declared to be void or the plaintiff would be entitled to a decree against the owner of the property?"

2. It is to be seen from the records that amendment was to be made in the plaint in accordance with the directions of the court, however, the amendment was not carried out either within the period fixed by the court or within 14 days as provided under Rule 18 of Order VI of the Code of Civil Procedure. It is, however, undisputed before me that amended plaint was filed and as a consequence to it, amended written statement was also filed.
3. It is undisputed that the parties knew about the case of each other, the court had cast necessary issues and allowed the parties to lead evidence in support of their pleadings. After hearing the parties, the learned trial court decreed each of the suits, but on appeal by the dissatisfied defendants, learned appellate court

allowed both the appeals holding, *inter alia*, that the trial court was not justified in taking in to consideration the amended pleadings as amendment was not incorporated in the original plaint and as the amended pleadings were not part of the records, a judgment could not be based upon it. The appellate court accordingly set aside the judgment and decree passed by the trial court and dismissed the suits. Being aggrieved by the said judgment and decree dismissing the suits, the plaintiff is before this Court.

4. At the time of the arguments, apart from the questions which have already been framed, it was submitted that this Court should exercise its powers under Rule 18 of Order VI of the Code, powers vested in the Court under Sections 151 and 152 of the Code, specially when the parties had filed the amended plaint and the amended written statement, but because of some technical lapse, the original pleadings as contained in the original plaint remained unamended.

5. Shri D.M.Shah, learned counsel for the appellant

submits that present is a case where justice is defeated because of the technicalities of law, according to him, if the parties knew about each other's case and had filed amended pleadings, then, not amending the original plaint would not have serious consequences leading to dismissal of the suits. On the other hand, Shri Shirish Joshi, learned counsel for the respondents-defendants submits that present is a case of absolute recklessness and carelessness on the part of the plaintiff and if in accordance with law pleadings have not been amended, then, at the second appellate stage, discretion cannot be exercised in favour of the appellant-plaintiff.

6. After hearing the parties, I think, one more substantial question of law should be framed by this Court.

> *"[iv] Whether on the facts and in the circumstances of the case, permission should be accorded in favour of the plaintiff to amend the original plaint exercising powers vested in this Court under Order VI Rule 18 read with Sections 151 and 152 of the Code of Civil Procedure, specially when the*

parties had filed amended pleadings and knew about the case of each other?"

7. Order VI Rule 18 provides that after obtaining an order for leave to amend, if such person does not amend or carry out amendment within time fixed or within the period of 14 days, then, he shall not be permitted to amend after the expiration of such period unless time is extended by the Court. Rule 18 of Order VI simply puts a bar or creates an embargo against interest of such person who has sought permission to amend, it does not curtail powers of a Court. The moment Rule 18 provides that such person would be entitled to carry out the amendment in the pleadings if the time is extended by the court, then, it must be held that every court would have jurisdiction to grant such permission. If the trial court has such jurisdiction, then, appeal being continuity of the suit, the first appellate court so also the second appellate court would have jurisdiction to extend the time to carry out amendment in the original pleadings. Section 153

of the Code provides that the Court may, at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. Order VI Rule 17 provides a right to a party to amend the pleadings but Section 153 read with Rule 18 of Order VI grants discretion to the court to make necessary amendments in the pleadings. In the present case, true it is that the amendment was not carried out in the original plaint, but the fact remains that amended plaint was filed, amended written statement was filed and the trial court, on the basis of the amended pleadings had cast issues. Not only this, the question of not incorporating the amendment was not made an issue before the trial court and undisputedly, the parties were heard on merits by the learned first appellate court. In technical sense, the learned first appellate court was justified in not reading the pleadings

which were to be brought on records by amendment, but justice cannot be allowed to be sacrificed on some technicality of law or on a hyper-technical issue.

8. Present is a case where, but for the court, nobody had raised an objection regarding non-incorporation of amendment. If the parties had led evidence and contested the matter on merits, then, nobody would be allowed to say that technical defect of this nature should nib in the bud and allow the court to dismiss the entire cause.

9. After hearing the learned counsel for the parties and taking into consideration the totality of the circumstances as narrated aforesaid, I am of the opinion that the plaintiff must get an opportunity to amend the pleadings. Without deciding the matter on merits, I decide question no. [iv] in favour of the plaintiff and permit him to carry out the amendment in the plaint. As I am allowing the plaintiff to carry out the amendment and purposefully not deciding the matter on merits,

I remand the matter back to the first appellate court so that the plaintiff, within 14 days of his appearance before the learned trial court, shall incorporate amendment in the plaint and thereafter the parties get appropriate opportunity to address the learned first appellate court on the merits of the matter.

10. While exercising powers under Rule 18 of Order VI and Sections 151 and 153 of the Code, I hereby direct the appellant-plaintiff to pay to the respondent-original defendants within 14 days of his appearance before the learned first appellate court, sum of Rs. 4,000/- [Four Thousand only] in each of the matter. If the amount of Rs. 4,000/- in each of the case is not paid by the plaintiff, then, he would not be allowed to incorporate the amendment and the appellate court would be entitled to dismiss the appeal. Each of the appeal, with the directions aforesaid is allowed. The parties shall bear their own costs.

11. Decree in each of the case be framed accordingly.

12. As a consequence of the disposal of the appeals, both the Civil Applications in the above appeals stand disposed of.

[R.S. GARG, J.]

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